74

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CONF.157/PC/62/Add.5
26 March 1993

Original: ENGLISH

WORLD CONFERENCE ON HUMAN RIGHTS
Preparatory Committee
Fourth session
Geneva, 19-30 April 1993
Item 5 of the provisional agenda

STATUS OF PREPARATION OF PUBLICATIONS, STUDIES AND DOCUMENTS FOR THE WORLD CONFERENCE

Note by the Secretariat

Addendum

Contribution submitted by the Committee on Economic, Social and Cultural Rights

The attention of the Preparatory Committee is drawn to the contribution submitted by the Committee on Economic, Social and Cultural Rights. This contribution consists of two texts. The first text (Annex I) entitled "Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights" was adopted by the Committee on Economic, Social and Cultural Rights on 7 December 1992. The second text (Annex II) is an analytical paper adopted by the Committee on 11 December 1992 entitled "Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights".

GE.93-12433 (E)

Annex I

STATEMENT TO THE WORLD CONFERENCE ON HUMAN RIGHTS ON BEHALF OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

(adopted by the Committee on 7 December 1992)

1. The preamble to each of the International Covenants on Human Rights recognizes that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". In the 45 years since the adoption of the Universal Declaration of Human Rights various formulations have been used to describe the relationship between the two categories of rights. They have been said variously to be interrelated, interdependent and indivisible. While preferences have sometimes been expressed for the use of one or another of these terms, the Committee believes that such debates must not be permitted to distract attention from the fact that respect for both categories of rights must go hand in hand.

2. This principle constitutes one of the fundamental underpinnings of the international consensus on human rights norms, and has been endorsed on innumerable occasions by the General Assembly, the Economic and Social Council and the Commission on Human Rights, and reflected in a wide range of treaty undertakings at both universal and regional levels. Nevertheless, in practice it has often been more honoured in the breach than in the observance. In 1993, as the United Nations celebrates the forty-fifth anniversary of the adoption of the Universal Declaration and the holding of the World Conference on Human Rights, it is imperative that full and careful consideration be given to the various ways and means by which the principle of indivisibility can be implemented and the situation of economic, social and cultural rights can be improved.

3. The Committee wishes to emphasize that full realization of human rights can never be achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive. For that reason, suggestions that the full realization of economic, social and cultural rights will be a direct consequence of, or will flow automatically from, the enjoyment of civil and political rights are misplaced. Such optimism is neither compatible with the basic principles of human rights nor is it supported by empirical evidence. The reality is that every society must work in a deliberate and carefully structured way to ensure the enjoyment by all of its members of their economic, social and cultural rights. Respect for civil and political rights is an indispensable condition for the full realization of all human rights; there is, however, no basis whatsoever to assume that the realization of economic, social and cultural rights will necessarily accompany, or result from, the realization of civil and political rights.

4. Just as carefully targeted policies and unremitting vigilance are necessary to ensure that respect for civil and political rights will follow from, for example, the holding of free and fair elections or from the

introduction or restoration of an essentially democratic system of government, so too is it essential that specific policies and programmes be devised and implemented by any Government which aims to ensure the respect of the economic, social and cultural rights of its citizens and of others for whom it is responsible.

5. The shocking reality, against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.

6. This is also true in relation to discriminatory policies and practices. Denial of the right to vote or of the right to freedom of speech, solely on the grounds of race or sex, is loudly and rightly condemned by the international community. Yet deep-rooted forms of discrimination in the enjoyment of economic, social and cultural rights against women, the elderly, the disabled and other vulnerable and disadvantaged groups are all too often tolerated as unfortunate realities. Thus, for example, many human rights advocates have little to say in response to the fact that women in many countries "are generally rewarded [for the disproportionate work burden they bear] with less food, less health care, less education, less training, less leisure, less income, less rights and less protection". a/

7. Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue. Such muted responses are facilitated by a reluctance to characterize the problems that exist as gross and massive denials of economic, social and cultural rights. Yet it is difficult to understand how the situation can realistically be portrayed in any other way.

8. The fact that one fifth of the world's population is afflicted by poverty, hunger, disease, illiteracy and insecurity is sufficient grounds for concluding that the economic, social and cultural rights of those persons are being denied on a massive scale. Yet there continue to be staunch human rights proponents - individuals, groups and Governments - who completely exclude these phenomena from their concerns. Such an approach to human rights is inhumane, distorted and incompatible with international standards. It is, in addition, ultimately self-defeating.

9. Democracy, stability and peace cannot long survive in conditions of chronic poverty, dispossession and neglect. Political freedom, free markets and pluralism have been embraced with enthusiasm by an ever-increasing number of peoples in recent years, in part because they have seen them as the best prospect of achieving basic economic, social and cultural rights. If that

quest proves to be futile the pressures in many societies to revert to authoritarian alternatives will be immense. Moreover, such failures will generate renewed large-scale movements of peoples involving additional flows of refugees, migrants and so-called "economic refugees", with all of their attendant tragedy and problems. As the Secretary-General has noted in his report on the work of the Organization submitted to the General Assembly at its forty-seventh session:

> "Political progress and economic development are inseparable: both are equally important and must be pursued simultaneously. Political stability is needed to develop effective economic policies, but when economic conditions deteriorate too much ... divisive political strife may take root." b/

10. The increasing emphasis being placed on free market policies brings with it a far greater need to ensure that appropriate measures are taken to safeguard and promote economic, social and cultural rights. Even the most ardent supporters of the free market have generally acknowledged that it is incapable, of its own accord, of protecting many of the most vulnerable and disadvantaged members of society. For that reason the concept of social safety nets has been widely promoted. While this concept has much to recommend it, it is imperative that it be defined so as to cover the full range of human rights and that it be formulated in terms of rights rather than charity or generosity. Safety nets which can be removed at the whim of the Government or other actors cannot therefore provide adequate protection for economic, social and cultural rights.

11. Despite the particular problems confronting many developing countries and other countries in transition, the failure to take seriously the denial of economic, social and cultural rights has not been the exclusive preserve of any particular group of countries. Indeed, the situation in those countries is too often the subject of gross over-generalizations which ignore the fact that some of the Governments concerned have done far more to promote the realization of economic, social and cultural rights than have others.

12. The same is true of Governments in the industrialized countries. Some of them tend to assume that the existence of a genuinely democratic system and the generation of relatively high levels of per capita income are sufficient evidence of comprehensive respect for human rights. Yet, the Committee's experience shows that such conditions are perfectly capable of coexisting with significant areas of neglect of the basic economic, social and cultural rights of large numbers of their citizens. High infant mortality rates, a significant incidence of hunger and malnutrition, mass unemployment, large-scale homelessness and high drop-out rates from educational institutions are all indicators, at least *prima facie*, of violations of economic, social and cultural rights and hence of human rights.

13. Despite the fact that some progress has been made in recent years, the Committee believes that there remain many steps which urgently need to be taken in order to promote effectively the progressive realization of these rights in the years ahead.

14. The first step is for all States Members of the United Nations to ratify or accede to the two International Covenants on Human Rights. The Committee notes that there are more than 60 States which have not yet taken this step and it urges them to give the most careful consideration to ratification or accession. In addition, those States which have become parties to only one of the International Covenants, but not the other, should take careful account of the implications of such selectivity in terms of the basic notion of the interdependence of the two categories of rights.

15. The Committee also wishes to emphasize the importance that it attaches to the reporting obligation accepted by States parties when they ratify or accede to the Covenant. Failure to report at all, or failure to do so within a reasonable period, constitute a breach of an important obligation contained in the Covenant vis-à-vis the international community. It is therefore desirable that means be explored by the World Conference to emphasize the unacceptability of such practices.

16. In the case of States which are parties to the Covenant, the most pressing challenge is to demonstrate that their commitment to economic, social and cultural rights is a genuine and enduring one. As the Committee has previously observed, this can best be done by the establishment by each State party of benchmarks which enable the Government concerned to ascertain the full extent to which the minimum core content of the basic rights in question is being satisfied. In addition, Governments should establish appropriate national and local mechanisms by which they and other relevant actors can be called to account in relation to situations in which the enjoyment of economic, social and cultural rights is clearly being denied.

17. It has often been suggested that these rights are not justifiable, by which it is meant that they are lacking in any elements which might be susceptible of determination by the courts. It is clear, however, that many and perhaps all of the rights do have at least some elements which are already, in the law and practice of some States, justiciable. Moreover, there are many more innovative approaches by which meaningful administrative or judicial remedies might be provided to individuals or groups claiming that their economic, social and cultural rights have been violated. These possibilities have been given insufficient attention in most countries not because of their legal or other complexities but because Governments have not been prepared to show the necessary political will and the commitment to economic and social justice.

18. The international community has long recognized the desirability of providing individuals with the possibility of seeking redress in instances where they consider their human rights to have been violated (such as, for example, in the form of the right to an effective remedy, as recognized in article 2 (3) of the International Covenant on Civil and Political Rights). Accordingly, and in recognition of the fact that many of the principal international human rights treaties already have such procedures, the Committee believes that there are strong reasons for adopting a complaints procedure (in the form of an optional protocol to the Covenant) in respect of the economic, social and cultural rights recognized in the Covenant. c/

Such a procedure would be entirely non-compulsory and would permit communications to be submitted by individuals or groups alleging violations of the rights recognized in the Covenant. It might also include an optional procedure for the consideration of inter-State complaints. Various procedural safeguards designed to guard against abuse of the procedure would be adopted. They would be similar in nature to those applying under the First Optional Protocol to the International Covenant on Civil and Political Rights.

Notes

a/ United Nations Children's Fund, The State of the World's Children, 1992 (New York, UNICEF, 1992), p. 57.

b/ A/47/1, para. 64.

c/ This proposal is considered in detail in the paper annexed to the present statement and to the report of the Committee on its seventh session (annex IV) [In this Preparatory Committee document the proposal is contained in Annex II below.]

Annex II

Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

(Analytical paper adopted by the Committee on Economic, Social and Cultural Rights at its seventh session, 11 December 1992)

A. Introduction

1. At its fifth session the Committee on Economic, Social and Cultural Rights requested its Rapporteur at the time to present it with a discussion note outlining the principal issues that would arise in connection with the drafting of an optional protocol to the International Covenant on Economic, Social and Cultural Rights "which would permit the submission of communications pertaining to some or all of the rights recognized in the Covenant". a/

2. Accordingly, a discussion note was presented to the Committee at its sixth session. b/ As the Committee's report on that session notes:

> "The members of the Committee ... supported the drafting of an optional protocol since that would enhance the practical implementation of the Covenant as well as the dialogue with States parties and would make it possible to focus the attention of public opinion to a greater extent on economic, social and cultural rights. The Covenant would no longer be considered as a 'poor relation' of the human rights instruments. Members stressed that the doctrine of the interdependence and indivisibility of human rights should form the basis of any work done by the Committee on drawing up such a draft. In the course of that work, without underestimating the difficulties stemming from the nature and the complexity of the rights guaranteed in the Covenant, it would be appropriate to initiate a dialogue or process which would make it possible, on the one hand, to identify the areas that lent themselves to the gradual development of such a recourse procedure and, on the other hand, to avoid any possible overlapping with the procedures existing under other international human rights instruments." c/

3. In the context of the same debate within the Committee, a number of issues were identified in relation to which it was considered that further analysis would be desirable. For that reason, the Committee agreed at its sixth session to request that a supplementary working paper, addressing the specific issues raised in the preceding discussions, be drafted for consideration at its seventh session.

4. A further working paper was prepared accordingly and discussed by the Committee at its seventh session. The details of its consideration of that paper are recorded in the summary record. d/ The Committee endorsed the general approach and requested the preparation of a revised and consolidated document which would combine the two discussion papers presented at the Committee's sixth and seventh sessions and which would also take account of the main points made during the debate at the Committee's seventh session.

5. The Committee expressed its strong support for the drafting and adopt of an optional protocol to the International Covenant on Economic, Social Cultural Rights. In order to facilitate further consideration of this proposal by the appropriate organs and by States parties, the Committee decided that the present analytical paper should be annexed both to the re on its seventh session and to the statement which it adopted to be sent to World Conference on Human Rights (see annex III). [Annex I of this Preparatory Committee document.].

6. The Committee also noted that the preparation of an optional protocol expressly recommended by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the realizati of economic, social and cultural rights in his final report (E/CN.4/Sub.2/1992/16, para. 211). It therefore expressed the hope that t matter would be discussed further by the relevant United Nations organs an noted that it might decide to pursue the issue again at future sessions.

B. Preliminary considerations

7. By way of introduction to the consideration of this issue several specific aspects of the proposal deserve to be emphasized.

8. First, it is important to note that any protocol to the Covenant will strictly optional and will thus only be applicable to those States parties which specifically agree to it by way of ratification. There is, therefor no question of imposing any additional obligations upon States parties to Covenant.

9. Second, the general principle of permitting complaints to be submitte under an international procedure in relation to economic, social and cultu rights is in no way new or especially innovative. Indeed, there are alrea number of long-established procedures at the international level which specifically provide for the consideration of such complaints. They inclu the ILO procedure for responding to alleged violations of trade union righ (art. 8 of the Covenant); the UNESCO procedure for dealing with alleged violations of rights relating to education, science and culture (arts. 13- of the Covenant); and the procedure established under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 which, as specifically affirmed by the Commission on Human Rights, applies also to the full range economic, social and cultural rights.

10. In addition, it may be noted that the Council of Europe is currently engaged in the drafting of an additional protocol to the European Social Charter. The Council's Parliamentary Assembly recommended, in September 1 that various reforms of the Charter be undertaken immediately, including t adoption of an effective complaints procedure. e/ Subsequently, a high-level ministerial meeting held in Turin, Italy in October 1991 to mar the thirtieth anniversary of that Charter recommended that the Committee o Ministers "examine at their earliest opportunity a draft protocol providin for a system of collective complaints, with a view to its adoption and ope for signature".

11. It should also be noted that provision already exists in the Inter-American system for complaints to be lodged in relation to the right to organize trade unions and the right to education. Thus, article 19 (6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador, of 1988) provides that:

> "Any instance in which [the right to organize trade unions and the right to education] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

12. Thirdly, experience to date with a wide range of existing international petition procedures indicates that there is no basis for fears that an optional protocol to the International Covenant on Economic, Social and Cultural Rights could lead to the Committee being inundated by complaints. Thus, for example, after 10 years in operation the complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination has generated no more than a handful of complaints. Similarly the procedure under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has developed only very gradually. The UNESCO procedure has also dealt with relatively few complaints since its establishment in 1978. By the same token, it must be borne in mind that even a very small number of complaints can provide the Committee with some singularly important opportunities to develop the jurisprudential understanding of the rights recognized in the Covenant.

13. Fourthly, it is to be recalled that complaints procedures such as that which is being proposed do not endow the relevant international body with the authority to demand that specific measures be taken by any State party. Ultimately, the influence and effectiveness of the procedure depends very largely upon the expertise of the Committee, the strength of its analysis of the issues and the persuasiveness of its conclusions.

14. Finally, it is appropriate to recall that the principle so often reaffirmed by the United Nations General Assembly and Commission on Human Rights concerning the indivisibility, interdependence and interrelatedness of the two sets of rights is undermined by the existence of various treaty-based petition procedures in relation to civil and political rights, but no such arrangements in relation to economic, social and cultural rights. If the latter set of rights is to be taken seriously and to be treated on an equal footing with civil and political rights it is essential that consideration be given to the provision of a complaints procedure for economic, social and cultural rights.

15. Some of these matters are elaborated upon in more detail below.

C. Background to the consideration of a complaints procedure

16. The Optional Protocol to the International Covenant on Civil and Political Rights of 1966 was proposed and adopted only at the very end of a protracted drafting process and came almost as an afterthought, once the precedent had been set in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Some of the proposals made during the drafting of the International Covenant on Economic, Social and Cultural Rights seemed to leave open the possibility of a comparable procedure being applied to that Covenant but, in the event, no State was really prepared to grasp the nettle and fight for such an approach to economic and social rights.

17. The International Conference on Human Rights, held at Tehran in 1968, provided a major impetus to renewed consideration of the means by which economic rights could most effectively be implemented. In particular, the Conference called upon "all Governments to focus their attention ... on developing and perfecting legal procedures for prevention of violations and defence of" economic, social and cultural rights. f/ One of the most immediate results of the Conference was the preparation by the Secretary-General of a detailed "preliminary study of issues relating to the realization of economic and social rights." g/ While at the international level the study did not go beyond existing approaches to implementation, it made a number of important observations on the nature of economic rights in the context of measures that might be taken at the national level. In addition to considering the feasibility of constitutional and legislative measures, the study argued that article 8 of the Universal Declaration (recognizing "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law") applied "of course, also to economic, social and cultural rights". h/ The study went on to note that many of those rights are capable of being protected at the national level "by the ordinary courts" and that, in many respects, that is already the situation in various States. i/

18. The Secretary-General's study thus placed considerable emphasis on the role of judicial and other remedies in vindicating claims for respect of economic rights. The Report prepared by Manouchehr Ganji, j/ which was commissioned after consideration by the Commission on Human Rights of the Secretary-General's study, adopted a very different approach. Its almost exclusive focus was on the problems faced by developing countries in overcoming poverty. The study did not deal with "national norms and standards governing the realization of economic, social and cultural rights" because such an endeavour would have "vastly exceeded the scope and space allotted to the study". k/ Nevertheless, the report concluded by suggesting that such a study "should be undertaken in the future". l/ But it never was.

19. The 1990s would appear to provide a different and potentially more hospitable environment for policy approaches designed to provide remedies to individuals and groups in cases of violations of their economic rights. This is reflected, in part, in the more sustained focus by the Commission on Human Rights in recent years on the means by which economic rights can effectively be implemented, at both national and international levels. It is also consistent with the approach to implementation which has gradually been

developed by the Committee on Economic, Social and Cultural Rights since its first session in 1987 and with trends within the European and Inter-American systems.

D. Principal argument in favour of an optional protocol

20. There are many arguments that can be made in support of the proposition that a complaints procedure ought to be incorporated into an optional protocol to supplement the International Covenant on Economic, Social and Cultural Rights. Ultimately, of course, the most compelling is that the aggregate enjoyment of economic rights by individuals and groups throughout the world will be significantly enhanced thereby. Other arguments would relate to the strengthening of the principle of international accountability by States parties to the Covenant and the development of a greater degree of comparability in the approaches used under the two Covenants. But, at least in the short term, the principal argument in favour of a complaints procedure rela to what might be termed its instrumental uses.

21. It is generally agreed that the major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the Covenant and the resulting lack of clarity as to their normative implications. m/ Articles 6 to 9 of the Covenant are a notable exception in this regard. The explanation for that fact is twofold. In the first place many of the rights covered by those provisions are better known to domestic legal systems (i.e. they have been recognized longer and with greater precision) than some of those dealt with in the remaining articles of part III of the Covenant. Secondly, and in part related, is the fact that the International Labour Organisation has been working since 1919 to develop and clarify the precise normative content of those rights. It has used a variety of methods for that purpose but many of them have a strong "petition" or complaints element about them. Thus, if we take the right to freedom of association (i.e. the right to form and join trade unions as recognized by article 8 of the Covenant, the ILO has developed an enormous jurisprudence through the mechanism of complaints being received and examined by the Committee on Freedom of Association. n/ As a result, if a difficult issue of interpretation with respect to article 8 of the Covenant arises, it is possible through the application of principles developed by the ILO (to the extent that they are deemed applicable in light of the terms of the Covenant and other relevant considerations) to say, with a significant degree of confidence, what is required of a State party in a given situation.

22. This may be contrasted with the situation relating to rights such as the right to health or the right to education. With respect to the latter, for example, the problems are perhaps best illustrated by reference to a question of interpretation of the Covenant that arose recently in a State party to the Covenant. Early in 1990 the Government introduced, for the first time for many years, tuition fees for full-time university students. That decision was challenged by the national University Students Association who sought the views of the national Human Rights Commission. The latter responded with an opinion that concluded that the imposition of fees would violate article 13 (2) (c) of the Covenant (which provides that "Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free

education"). In addition to other reasons cited to justify this conclusion the Commission expressly rejected the argument that an adverse economic situation in the country as a whole could be used to justify a reduction in the level of educational services provided by the Government. In the event the Government rejected the Commission's interpretation of the Covenant and insisted that its approach was indeed consistent with the relevant provisio In doing so, it observed that "... essentially, it is not for the Human Rig Commission to be making an assessment of the resources available to the Government to extend the availability of tertiary education". This case raises several questions of considerable importance in terms of the interpretation of the Covenant. They include: the nature of the undertaki in article 13 (2) (c); the meaning of the concept of "progressive realization"; the basis for determining what resources are "available" for purposes of the Covenant; and the extent to which existing levels of enjoym of economic rights can be intentionally reduced on the grounds of economic necessity.

23. Despite the critical importance of these provisions, neither the relev Government nor the Human Rights Commission, nor any other interested party, could turn to any specific jurisprudence generated by the Committee on Economic, Social and Cultural Rights for guidance in interpreting the Government's obligations under the Covenant. Similarly, if and when the is eventually comes before the Committee it will (for reasons noted below) fin itself unable to examine the issues with any degree of sophistication or precision.

24. As long as the majority of the provisions of the Covenant (and most notably those relating to education, health care, food and nutrition, and housing) are not the subject of any detailed jurisprudential scrutiny at th international level, it is most unlikely that they will be subject to such examination at the national level either. The principal reason for this is that provisions which are stated in very general terms (such as article 11 the Covenant) are highly unlikely to be deemed by national authorities to l themselves to judicial or administrative application in the absence of legislative enactments spelling out more clearly their implications in term of the domestic legal order. With respect to most of the Covenant's provisions (excluding arts. 6 to 9, for reasons noted earlier), there are strong grounds for predicting that national courts will find them to be "non-self-executing", not "directly applicable" or not capable of having "direct effect". Which of these terms will be used depends on the approach international treaty obligations manifested in the relevant municipal legal order. In any event, the result will be that the obligations flowing from Covenant will continue to be stated only in the most general terms and will rarely be subject to the type of detailed judicial analysis that can help immeasurably in facilitating a clearer, more precise and more nuanced understanding of the implications of international human rights norms.

25. Thus, it is hardly surprising to note that the vast majority of cases which the Covenant has been invoked in domestic court proceedings concern labour-related issues dealt with in articles 6 to 8 of the Covenant. In th Netherlands, for example, there have been several such cases. o/ On the other hand, even in a country such as Finland, which is very economic

rights-conscious and in which international human rights instruments are taken very seriously, there have been no cases in which the Covenant has been directly applied by the courts. p/

E. Limitations of existing methods for developing the Covenant's jurisprudence

26. The Covenant itself foresees only one method by which the jurisprudence of the rights contained in the Covenant might be elaborated upon. That is through the examination of States parties' reports by the Economic and Social Council. The latter task is now, for all intents and purposes, carried out by the Committee on Economic, Social and Cultural Rights. The Committee has also developed two other techniques by which it might better contribute to an understanding of the normative content of the various rights. They are the elaboration of general comments and the holding of a day of general discussion at each of its sessions.

27. Nevertheless, it is clear that none of these methods provides the necessary opportunity for the Committee to take a specific issue, to examine it at length in a particular situation and to develop any considered views on the extent to which a given act or omission is in compliance with the provisions of the Covenant. The examination of State parties reports has, on a significant number of occasions, thrown up issues with respect to which opinion in the Committee has been divided. In some instances individual members have expressed their view that a violation is involved and in others the Committee as a whole has effectively endorsed such a conclusion. The reality is, however, that any such conclusion is soft in the extreme and can represent no more than a tentative and usually highly speculative view. The reasons for that unavoidable softness are not difficult to find. In the first place, the information available is usually only of a very general kind. Thus, for example, the Committee has never really examined a State's constitution per se or even a piece of legislation in its entirety. Indeed, these texts have never really been presented to it. (In some cases, such documents are appended to the State party's report but they are never translated or reproduced for the benefit of Committee members.) Secondly, the examination of a given issue is rarely able to be situated in the context of the prevailing reality in the State concerned. Even where a non-governmental organization makes a written submission to the Committee (a rare enough occurrence) it will generally not convey the sort of detailed and precise information that would enable the Committee to delve into an issue in any depth. Thirdly, the Committee's mandate to examine reports on a periodic basis does not really entitle it to insist, vis-à-vis the State party, that it be permitted to pursue specific cases.

28. The adoption of general comments provides an opportunity for the Committee to make a significant contribution to the jurisprudence surrounding a particular right or issue. But the inherent limitations involved in the raw material available to it under the reporting procedure, combined with a tradition (set mainly by the Human Rights Committee) of making only rather general observations in the context of general comments, ensures that major jurisprudential contributions will not usually emanate from that source.

Similarly, the Committee's day of general discussion, for all its worth in other respects, is not conducive to a detailed examination of normative issues.

F. Function of complaints procedures

(a) Under other treaties

29. Much of what has been said above tends to assume that treaty-based complaints procedures which are already in existence have succeeded in maki a significant contribution to developing the normative content of the relev rights. It must be noted from the outset, however, that this assessment is based only on the experience relating to the Optional Protocol to the International Covenant on Civil and Political Rights. The Committee on the Elimination of Racial Discrimination has succeeded in attracting relatively few complaints under the optional procedure established by article 14 of th International Convention on the Elimination of all Forms of Racial Discrimination. Indeed, since it came into force in 1984 the Committee has adopted an opinion on only two communications. Similarly, the optional complaints procedure under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is of too recent origin to perm meaningful conclusions to be drawn as to its jurisprudential productivity.

30. It is unnecessary in the present context to review the results of the Optional Protocol procedure under the Covenant in any detail. Suffice it t say that the vast majority of commentators who have assessed the work of th Human Rights Committee have acknowledged the enormous importance of the procedure in terms of its contribution to an enhanced understanding of the normative implications of many of the provisions contained in the Covenant. Thus, Graefrath has observed that its "limited function" includes "elaborat on the legal contents of an international human rights standard, its specif characteristics and its possibilities for adjustment". q/ He also acknowledges that, although the procedure is ill equipped to provide much consolation to an individual complainant, it might have a very beneficial impact on the situation involving other individuals who face similar proble

31. But perhaps the most telling evidence of the jurisprudential value of complaints procedure is the fact that the collected "views" of the Committe based on individual cases are of much greater value in shedding light on th meaning of the various rights formulations than either the Committee's gene comments or the insights generated by its examination of State parties' reports. Indeed, the Human Rights Committee has already succeeded in shedd considerable light on issues dealt with in the International Covenant on Economic, Social and Cultural Rights simply because those issues have been found to be intimately related to matters arising under petitions submitted relation to the International Covenant on Civil and Political Rights. This impact has been carefully described and analysed in a detailed study of the manner in which the norms found in the former Covenant have "permeated" the latter Covenant. r/

(b) Under the International Covenant on Economic, Social and Cultural Rights

32. We come now to the central point in this analysis. In what ways could the adoption of a complaints procedure (presumably in the form of an optional protocol) contribute to the understanding of economic and social rights in general and to the standing and practical relevance of the Covenant in particular?

33. First, a complaints procedure brings concrete and tangible issues into relief. The real problems confronting individuals and groups come alive in a way that can never be the case in the context of the abstract discussions that arise in the setting of the reporting procedure.

34. Second, the focus on a particular case provides a framework for inquiry which is otherwise absent. It should ideally involve the submission of precise and detailed information by a petitioner which, in turn, should ensure the provision of equally clearly focused information by the Government concerned. Even where the dialogue is in writing the capacity to get to the nub of issues is vastly greater than it is under the reporting procedure. The Committee is thus able to, and in many respects is forced to, come to grips with the more complex issues that underlie many of the Covenant's provisions.

35. Third, the mere possibility that complaints might be brought in an international forum should encourage Governments to ensure that more effective local remedies are available in respect of economic and social rights issues (thus making it less likely that the international forum will be able to accept jurisdiction).

36. Fourth, the existence of a potential "remedy" at the international level provides an incentive to individuals and groups to formulate some of their economic and social claims in more precise terms and in relation to the specific provisions of the Covenant. Such a development could contribute very significantly towards bridging the gap between human rights concerns narrowly construed and broader social justice issues.

37. Fifth, the possibility of an adverse "finding" by an international committee would give economic and social rights a salience in terms of the political concerns of Governments that those rights very largely lack at present. As Graefrath has noted in relation to the Optional Protocol to the International Covenant on Civil and Political Rights: "Despite the fact that the Committee's views or opinions are not binding, they are powerful legal opinions which cannot easily be neglected by a State ...". s/

38. Finally, a complaints procedure produces a tangible result which, in terms of "human interest" potential, is far more likely to generate interest in, and an understanding of, the Covenant in general and of the specific issues concerned.

39. Having extolled the potential virtues of a complaints procedure it is also appropriate to note that this "normative-judicial" model is not without its shortcomings. In particular there are various reasons why individuals whose rights are severely threatened might still not avail themselves of an

international petition system. They include: (a) ignorance of the existen of an applicable international procedure; (b) a lack of time and/or resourc (c) the physical impossibility of lodging a complaint; (d) the difficulty o demonstrating sufficient individual, as opposed to general community, stand to justify lodging a complaint; and (e) the assumption that the internation body in question is, for political or other reasons, unlikely to take a sta in favour of the victim(s) in a given situation.

40. Nevertheless, as compelling as these arguments might be in terms of th case for not relying exclusively on complaints procedures, they lose most, not all, of their force in the context of implementation measures which provide for both petition and reporting mechanisms. Since the latter is no firmly established in the case of the International Covenant on Economic, Social and Cultural Rights there are strong reasons for seeking to compleme it by a complaints procedure.

G. Relevance of the equality of rights argument

41. The doctrine of the interdependence and indivisibility of all human rights is central to the normative underpinnings of international human rig law as it now exists. There are thus very strong reasons why this doctrine ought to be reflected in a roughly proportionate way in terms of the procedures that are utilized for their promotion and protection. That is n to argue either that the two sets of rights are identical in every way or t a procedure for monitoring respect for civil and political rights must alwa have its direct counterpart in relation to economic and social rights (or vice versa). Nevertheless, where there are major disparities in terms of t respective mechanisms or procedures, they need to be justified by reference objective factors such as the intrinsic nature of the rights involved.

42. The most obvious disparity in this regard relates to the availability petition procedures. In the civil and political rights area these procedur have been generally accepted. Thus, appropriate institutional mechanisms a provided for in relation to the International Covenant on Civil and Politic Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment. But there is no such mechanism attached the International Covenant on Economic, Social and Cultural Rights. How, i at all, is this to be explained or justified? What arguments have been, or might be, used to defend the status quo?

H. Review of some of the counter-arguments

(a) Economic rights should be approached in an exclusively non-adversarial manner

43. It has frequently been observed that confrontation might not be the m productive way of persuading Governments to change their economic policies to adopt whatever other measures might be needed to secure the realization economic and social rights. Without wishing to challenge that proposition needs to be read as being subject to two major qualifications. The first i that a petition procedure should not be seen as an inherently confrontation one. Such procedures are becoming increasingly common and unexceptional an

should be seen as providing a framework within which a particular policy or approach can be taken before an independent, expert panel for review in the light of freely accepted and clearly applicable standards. Moreover, as Harris has noted, "a petition system usually has a conciliation stage, and the existence of a case against a State may help to concentrate its mind." t/ The second is that while an adversarial approach (if that is how a Government wishes to portray a complaints procedure) should be a last resort in this area, it should never be entirely excluded. Thus, the "Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights" devote considerable attention to the need to address violations of these rights. u/ In the final analysis, it is difficult to understand how torture can be deemed a matter worthy of confrontation but deliberate starvation or the discriminatory denial of all basic health care should be matters to be addressed in a determinedly friendly and polite fashion.

(b) Economic rights are not justiciable

44. This is an issue to which adequate attention has been given elsewhere. It is sufficient to point to existing practice in many States to demonstrate that a wide range of economic rights are regularly the subject of judicial adjudication. In addition to many Western European countries, reference might also be made to some celebrated excursions in this domain by the Indian Supreme Court.

45. At the international level, there is also abundant evidence to refute the proposition. Apart from the obvious examples of all the economic rights which have long been the subject of ILO petition procedures, mention can also be made of the increasingly common forays of the Human Rights Committee into economic rights territory. Similarly, it has been convincingly shown that the work of the Committee of Independent Experts under the European Social Charter has frequently dealt with economic rights issues in a manner which confirms that the rights would be justiciable. v/

46. But perhaps the most compelling response to the argument that economic rights are not justiciable is that this procedure would only apply to those that are deemed to be justiciable, at least in part. Moreover, one of the basic objectives of the procedure is to enhance understanding of the normative content of the rights and thus to shed more light on aspects of the notion of justiciability.

(c) Group rights are an inappropriate focus for individual petition procedures

47. This argument is flawed on at least two counts. First, petition procedures are not exclusively concerned with the procedures and complaints of individuals. Many of them explicitly provide for petitions on behalf of groups to be dealt with. Secondly, despite an old canard to this effect, economic and social rights are not, per se, group rights. It may well be that their enjoyment is usually best promoted by generally applicable policies or programmes, but so too are most civil and political rights. This preferred approach to promotion does not fundamentally alter the nature of the rights

themselves. It is, after all, the individual who starves to death, dies because of a lack of health care or suffers from the consequences of illiteracy.

48. It has also been pointed out that arguments such as this overlook or oversimplify the means by which progress is generally achieved in the human rights field. As Jacobs has pointed out in the European context, "the contrast between the Convention [complaints-based] system and the Charter [reporting-based] system may be misplaced ... since although the Convention provides a direct remedy for the individual its true effectiveness has been to remedy defects in national laws and practices rather than to provide the individual with a cure for his particular complaint." w/

I. Consideration of specific issues

49. In the discussion on this issue by the Committee on Economic, Social and Cultural Rights at its sixth session four major issues were identified, in relation to which greater specificity was sought. The analysis that follows seeks to examine the options that might be considered with respect to each of these matters. In brief, the four issues are: (a) Who could exercise the right of complaint?; (b) What rights would be covered by the procedure?; (c) What procedural rules would be applied?; and (d) What possible outcomes could be envisaged from the procedure?

J. Who could exercise the right of complaint?

50. The answer to this question depends in turn on the answers given to three others. The first is whether only inter-State complaints should be accepted. The second is whether, either in addition or alternatively, complaints should be accepted from individuals or only on a collective basis. And third, if the latter approach is taken, then the question is to determine the basis upon which specific groups would be authorized to submit complaints.

(a) An inter-State system

51. Several of the principal international human rights treaties contain provision for a procedure under which one or more States parties to the treaty may lodge a complaint against another State party alleging non-compliance with the relevant obligations. Long experience has demonstrated, however, that these procedures are invoked extremely rarely and then only in relation to situations of very major significance. States are very clearly reluctant to make use of such procedures. As a result, the procedure contained in article 41 of the International Covenant on Civil and Political Rights has never once been invoked since the Covenant's entry into force in 1976.

52. Thus, while an inter-State procedure might be considered as an additional measure, it could not be considered to be a satisfactory substitute for an individual or collective complaints procedure. This is confirmed by recent developments in relation to a proposed procedure under the European Social Charter, in connection with which a proposal to confine the scope of the procedure to inter-State complaints was firmly rejected.

53. That is not to say, however, that both an individual and an inter-State mechanism should not be considered. While the latter clearly has some potential to be misused in the context of political disputes between States, it could become a very attractive means by which to facilitate the resolution of inter-State disputes. This will be particularly the case if States show an increased willingness to resort to such mechanisms in the future and if nationality and minority-related disputes continue to hinder friendly relations between neighbouring States.

(b) An individual or collective procedure?

54. It is sometimes suggested that the rights recognized in the International Covenant on Economic, Social and Cultural Rights are of an essentially collective nature. In principle, this characterization is clearly incorrect since the Covenant specifically refers to the rights of "everyone". Nevertheless, there is a collective element to the extent that measures to improve the enjoyment of an individual's economic, social or cultural rights would normally extend beyond that individual and encompass a variety of other persons whose situation is in some way comparable or related. This is not, however, significantly different from the situation that applies in relation to measures to improve the enjoyment of many civil and political rights.

55. There is thus no intrinsic reason why a complaints system in the field of economic, social and cultural rights should not be based on the right of individuals to lodge communications. Perhaps the strongest argument in favour of such an approach is that by focusing upon the plight of a particular individual, the Committee would most readily be enabled to ascertain all of the facts and to see an issue directly in terms of its impact on the enjoyment of a specific right. The objection that such an individualistic focus would do little to improve the situation of "the masses" is partly negated by the fact that virtually all international complaints procedures focus upon the situation of a specific individual, on the assumption that resulting "test" cases will very often have implications extending well beyond that narrow focus.

56. There are, however, at least two objections that might be made to a proposal that complaints be accepted from individuals. The first is that the Committee might be swamped by a flood of complaints from individuals whose situations were, in effect, unique, thus requiring it to deal with an unmanageably large number of isolated complaints. The fear might be that the resulting workload would paralyse the Committee and eventually render it unable to deal effectively with any of the very many complaints received, thus bringing the entire procedure into disrepute. This possibility could not be definitively ruled out, but it must be emphasized that such problems have never been confronted by any of the existing procedures that accept individual complaints. Thus, for example, over a period of 10 years the complaints procedure established under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination has considered only two complaints. Moreover, the procedural requirements that must be satisfied before a complaint can be deemed admissible are usually considered to be the best means by which to ensure that such an unmanageable flood of complaints is avoided.

57. The second possible objection is that it might sometimes be difficult to justify a request to a State party to consider adopting measures of a general, structural nature solely on the basis of the examination of a complaint by one individual.

58. If a cautious approach is taken, it may be appropriate to acknowledge that there might be some grounds for concern in response to these and similar objections. That does not necessarily mean, however, that the only viable approach is to restrict complaints to those of a collective nature. In other words, it need not follow that the complaints procedure should be confined to petitions lodged by a collective organization of some sort, such as a labour union or a non-governmental organization. Rather, there is a clearly established and accepted middle ground which consists of accepting complaints from both individuals and groups, provided that they relate to situations which have implications extending beyond the narrow concerns of the individual applicant.

59. There are several criteria which might be adopted in order to reflect such a requirement. One would be to require complainants to show that the issue raised affects a significant number of people. While the term "significant" is inevitably open-ended it would, in effect, be for the complainant to demonstrate that the criterion is satisfied and for the Committee to exercise its discretion in determining whether or not the relevant threshold has been achieved. Another criterion would be to require that the action (or omission) in question be "systematic". While this is also a somewhat open-ended term, it would exclude cases which clearly involved only isolated incidents affecting one individual and practised only by one respondent. The term "systematic" has long been used, and applied without any particular difficulty, by both the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights in connection with their respective roles under the procedure foreseen in Economic and Social Council resolution 1503 (XLVIII). The term "pattern", which is also part of the definition contained in the procedure, represents another means by which the requirement of detriment going beyond the situation of a single individual could be reflected.

60. Another alternative, designed to avoid reliance upon such general criteria as "systematic", "patterned", or "significant", would be to formulate a rather more demanding set of criteria which would, for example, necessitate a showing of persistent discrimination or the presence of intrinsic, structural, systemic defects which have resulted in widespread disentitlement. But while such complex formulations might have some appeal to those who are especially concerned to limit the scope of the procedure, it must be borne in mind that complexity of this nature is not only more difficult for complainants to understand but also for a committee to apply.

61. If a decision were taken to limit the right to petition to collective complaints it would be necessary to determine which collectivities, or groups, would be entitled to lodge complaints and on the basis of what criteria. Several options would be available in this regard. The first, and perhaps the narrowest, would be to restrict the use of the procedure to non-governmental organizations which enjoy consultative status with the Economic and Social Council. This would be an appropriate criterion if it were one of several,

but not in isolation. If it were the sole criterion, it would have the effect of excluding the great majority of groups operating at the national level which have the closest knowledge of the domestic situation and are thus best placed to formulate a complaint. While such groups would retain the possibility of working through one of the international non-governmental organizations with consultative status, there would be a very large number which, for a variety of reasons, would not be able to do so in practice.

62. Thus, if complaints were to be restricted to collective groups only, it would be highly desirable to ensure that certain national groups, in addition to non-governmental organizations in consultative status, be enabled to lodge complaints. The determination of which groups would be so authorized could be entrusted to both the relevant State party and the Committee.

63. In the case of the State party, several options might be envisaged. In the first place, the right to lodge communications could automatically be given to the principal social partners (interpreted in the sense used by the ILO), which would include the major national groups of workers and employers and other key national groups. Secondly, the State party could undertake to authorize various other groups for this propose. Thirdly, the State party could, on an ad hoc basis, agree to the submission of a complaint by a particular group which is not otherwise among the indicated categories of authorized groups. Finally, the optional protocol itself could specifically allow for each State party, in ratifying the instrument, to make a declaration recognizing the right of any representative national non-governmental organization to lodge a complaint.

64. In the case of the Committee, the optional protocol could vest in the Committee the discretion whether to accept a complaint if the complainant is able to demonstrate that no other effective avenue for lodging a complaint is open or available.

65. The above analysis indicates that there is a significant range of possibilities for determining which groups might be authorized to submit complaints. It also demonstrates, however, that this approach is potentially rather complicated and cumbersome and that significant opportunities would exist for the State party to prevent or inhibit the effective submission of a complaint under the procedure. In order to avoid these complexities and the possibility of manipulation or abuse, if would seem far preferable for the procedure to be open to any individuals or groups. A decision to reject that approach would need to be premised on the assumption that such an open approach would be more readily abused than a restrictive approach. Experience to date, however, does not bear this out. Virtually all of the existing procedures are entirely open in this regard and there have been few, if any, instances of serious abuse on the part of petitioners. Moreover, the most effective way of combating any abuse of this nature is for the Committee itself to remain vigilant.

66. In their discussions on this issue at the seventh session of the Committee on Economic, Social and Cultural Rights members of the Committee indicated a strong and clear preference for an individual complaints procedure as being the most equitable, workable and constructive solution to the problems discussed above.

67. One of the issues specifically examined by the Committee in relation to the sort of criteria considered above concerns the resulting complexity of the requirements for admissibility of a complaint. Such concerns would be especially justified if it were not open to the Committee to decide to combine the admissibility and merits phases of the complaint in appropriate cases. The separation of the phases is appropriate in relation to cases in which the Committee feels able to make a reasonably clear-cut negative finding in relation to admissibility (e.g. for lack of relevance to the Covenant, for patent inadequacy of the information provided or for abuse of privilege). In many other cases, however, the relationship between the issues to be considered as to admissibility and the merits would be so close as to warrant a consideration of both at the same time. This would also enable the Committee to act in a much more expeditious manner than might otherwise be the case.

K. What rights would be covered by the procedure?

68. In terms of the range of rights contained in the Covenant to which the optional protocol procedure would be applicable, there would appear to be at least four options. They are:

(a) The procedure would only apply to certain selected rights, on the assumption that the scope of coverage would be gradually expanded over time;

(b) Each State party would be able to indicate at the time of ratification of the protocol the rights to which the procedure would apply in respect of itself;

(c) The procedure would apply to all of the specific rights recognized in articles 6 to 15; and

(d) The procedure would apply to the entire Covenant.

69. Each of these options will now be considered briefly, in order.

(a) Application of the procedure only to certain selected rights

70. It is often assumed that some of the rights contained in the Covenant are already, or are at least potentially, justiciable, while others are not. The conclusion to be drawn from this assumption is that only those rights which are clearly justiciable ought to be subject to the complaints procedure. It is submitted, however, that this assumption constitutes a significant oversimplification of the issue and results in the presentation of a rather misleading picture. The reality would seem to be rather different. On the one hand, it would seem possible to identify justiciable dimensions of virtually all of the rights recognized in the Covenant. On the other hand, some of the rights which are most commonly assumed to be justiciable, such as the right to reasonable working conditions or the right to social security, may have aspects which are not readily susceptible to determinations by the courts.

71. For these reasons, it would seem inappropriate to select certain rights as being subject to the optional protocol, while rejecting others as being

unsuitable. Rather, what is required is to address directly the concern which underlies the suggestion that only certain rights be covered. That concern is to ensure that the Committee does not have to deal with issues which are clearly incapable of being resolved within a complaints-type procedure. Such issues would include, for example, in particular, matters which are appropriately determined only by the domestic political process. But that function is best performed not by a restrictive listing of the rights to be covered by the protocol but rather by the adoption of appropriate procedural safeguards. This matter is considered below.

72. It may also be questioned whether it is reasonable to assume that an initially restrictive listing of the rights covered by the procedure would, realistically, be likely to be expanded gradually over time. Any such expansion would require an amendment to the protocol and a new act of ratification or succession on the part of relevant States parties. That procedure is sufficiently cumbersome and time consuming as to make it unlikely that any such amendments would be undertaken, in which case the initial, restrictive, range of rights would never be expanded. The result would be that certain rights would be assumed to be of greater importance than others and would be the subject of sustained attention under the procedure while others would remain untouched.

(b) States parties would indicate at the time of ratification the rights in respect to which it would accept the application of the procedure

73. This approach would, to some extent, be consistent with the approach reflected in the European Social Charter which enables States parties to determine which of the rights they will accept to be bound by, providing, however, that a minimum number of rights is accepted. One problem with this approach is that it might enable some States to obtain the prestige associated with the ratification of the protocol while at the same time incurring only very minimal obligations. Nevertheless, the acceptance of some such obligations would be better than none and the possibility of a particular State being able to exclude the application of the procedure in respect of certain rights might make ratification more acceptable and likely.

74. Another problem that should be noted in relation to this approach is that certain key rights might be consistently excluded by ratifying States. Thus, for example, it would be possible for a State to ratify the protocol while excluding articles 10 and 12 from its coverage. This would mean that the right to health care, children's rights, the right to an adequate standard of living, the right to food and the right to housing would all be excluded, thus removing from the purview of the procedure many of the key rights recognized in the Covenant.

(c) Application of the procedure to all of the specific rights recognized in articles 6 to 15

75. This approach would ensure that no invidious distinctions were drawn between the different rights and would enable the Committee to take an integrated and comprehensive approach to the specific rights. It would be

necessary, however, to ensure that the prohibition of discrimination contained in article 2 of the Covenant was not thereby excluded from the scope of the procedure. This could be achieved through a specific provision.

76. One consequence of this approach would be the exclusion of the right to self-determination and of the other provisions of article 1 of the Covenant from the purview of the procedure.

(d) Application of the procedure to articles 1 to 15 of the Covenant

77. As noted earlier, there is much to be said for adopting a comprehensive approach to any optional procedure. In particular, the fact that virtually all of the rights recognized in the Covenant are already covered by one or more international complaints procedures would argue strongly against adopting a more restrictive approach in the context of the single most important and comprehensive international treaty dealing with economic, social and cultural rights.

78. A comprehensive approach would also mirror the approach taken in relation to the Optional Protocol to the International Covenant on Civil and Political Rights. During discussions by the Committee at its seventh session there was strong support for such an approach.

79. The adoption of a comprehensive approach under the optional protocol would in no way preclude the operation of various procedural safeguards which would help to ensure that the procedure did not lead to the consideration of matters which no not belong in such a setting. The question of what those safeguards might be is now therefore addressed.

L. What procedural rules would be applied?

80. The most important procedural issue, and the only one specifically raised during the Committee's discussion at its sixth session, concerns the need for a provision relating to the exhaustion of domestic remedies. This requirement is a feature of virtually all international complaints procedures and would certainly need to be reflected in the procedure provided for in any optional protocol.

81. Similarly, the other major procedural safeguards that apply to other instruments, and in particular to the Optional Protocol to the International Covenant on Civil and Political Rights, would also be appropriate in relation to an optional protocol under the other Covenant. They include the following:

82. The temporary dimension (ratione temporis): complaints are only admissible in so far as they relate to acts or omissions which occur after the optional protocol has come into effect for the State party concerned.

83. The subject-matter of the complaint (ratione materiae): complaints will only be admissible if they relate specifically to the rights recognized in the International Covenant on Economic, Social and Cultural Rights.

84. The object of the complaint (ratione personae): the procedure would only apply in relation to alleged non-compliance by a State which is a party to

both the International Covenant on Economic, Social and Cultural Rights and the optional protocol thereto. Thus, if a State validly ceases to be a party to the Covenant, the Committee would no longer be competent to consider complaints under the optional protocol in relation to that State.

85. The requirement that some detriment has been suffered: in the case of the Optional Protocol to the International Covenant on Civil and Political Rights an individual submitting a communication must claim to have been a "victim" of a violation by the State party concerned. While the same rule could be applied in relation to the optional protocol to the International Covenant on Economic, Social and Cultural Rights, it would seem more appropriate in the case of these rights (particularly taking account of the collective dimension of the remedies that would generally be sought) not to require that the individual concerned be a victim but rather that the individual or group be able to demonstrate that a clear "detriment" has been suffered. This approach would avoid "speculative" complaints that rely solely upon anticipated or predicted harm, without restricting the range of potential complainants unduly.

86. Nevertheless, if the requirement that the complainant be a victim is maintained, it would not seem likely in practice to restrict significantly either the type of issues that could be raised or the potential range of petitioners.

87. The jurisdictional requirement (rationae loci): complainants would only be admissible if they are submitted by petitioners subject to the jurisdiction of the State party concerned. It would thus not be possible for an individual resident in one State to lodge a complaint against another State with which he or she has no particular connection and to whose jurisdiction the person is not subject.

88. Non-duplication of procedures: it would also seem appropriate for the optional protocol to indicate, as does the existing Optional Protocol, that the Committee would be precluded from examining a communication if the same matter is being examined simultaneously under another procedure of international investigation or settlement.

89. Finally, the protocol would contain a general provision enabling the Committee to dismiss any matter which it considered to constitute an abuse of the right to petition.

90. It should be noted that, in determining how these safeguards would be applied in practice, careful regard would be had to the approach adopted by the Human Rights Committee in relation to the Optional Protocol to the International Covenant on Civil and Political Rights.

M. What possible outcomes could be envisaged from the procedure?

91. The Optional Protocol to the International Covenant on Civil and Political Rights indicates only that the Committee, at the completion of its consideration of a matter, "shall forward its views to the State party concerned and to the individual" (art. 5(4)). The same approach would be appropriate in relation to the new optional protocol.

92. In addition, however, the nature of many of the issues likely to be raised in connection with the International Covenant on Economic, Social and Cultural Rights would seem to make it appropriate to place a particular emphasis upon the desirability of seeking a friendly settlement of complaints. A provision of this type is contained in the European Convention on Human Rights and there has been a significant number of instances in which such settlements have been arrived at, usually in much less time than is taken by alternative approaches. It would, of course, be assumed that no such settlement would be agreed to by the Committee in cases where it was not convinced that respect for the rights recognized in the Covenant would be adequately ensured by the terms of the proposed settlement.

N. Conclusion

93. The overriding argument in favour of developing an optional protocol to the International Covenant on Economic, Social and Cultural Rights is that a system for the examination of individual cases offers the only real hope that the international community will be able to move towards the development of a significant body of jurisprudence in this field. As the experience of the Human Rights Committee demonstrates such a development is essential if economic, social and cultural rights are to be treated as seriously as they deserve to be. Until that happens, efforts by the Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities and other bodies to attribute meaningful normative content to those rights shall be doomed to fail.

94. This is not to say that a petition system should be the only or even the main component in an overall implementation system. It should not. Writing in 1950, Lauterpacht argued for just such an approach. He acknowledged that the "enforcement" of economic and social rights should not be made "primarily judicial in character", although he did not rule out the appropriateness of such an approach in particular instances. He also observed that "[u]nless an effective right of petition ... is granted to individuals concerned or to bodies acting on their behalf, any international remedy that may be provided will be deficient in its vital aspect." x/

Notes

a/ E/1991/23, para. 285.

b/ E/C.12/1991/WP.2.

c/ E/1992/23, para. 362.

d/ E/C.12/1992/SR.11

e/ Parliamentary Assembly of the Council of Europe, Recommendation 1168 (1991).

f/ Final Act of the International Conference on Human Rights, (United Nations publication, Sales No. E.68.XIV.2), resolution XXI, para. 6.

g/ E/CN.4/988.

h/ Ibid., para. 157.

i/ Ibid., para. 159.

j/ The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress (United Nations publication, Sales No. E.75.XIV.2.)

k/ Ibid., Part Six, para. 151.

l/ Ibid.

m/ E.g. A. Eide, "Realization of social and economic rights", 10 Human Rights Law Journal (1989) p. 35.

n/ See, e.g., International Labour Organisation, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd ed. (Geneva, 1985).

o/ E.g., Schermers, "Some recent cases delaying the direct effect of International treaties in Dutch law", 10 Michigan Journal of International Law (1989), p. 266.

p/ Karapuu and Rosas, "Economic, social and cultural rights in Finland", in Rosas (ed.), International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives (Helsinki, Finnish Lawyers' Publishing Co., 1990) p. 195 at p. 204.

q/ B. Graefrath, "Reporting and complaint systems in universal human rights treaties", in Rosas and Helgesen (eds.), Human Rights in a Changing East-West Perspective (London, Pinter, 1990) p. 290 at p. 327.

r/ Scott, "The interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants on Human Rights", 27 Osgoode Hall Law Journal (1989) p. 769.

s/ Graefrath, loc. cit., p. 319.

t/ Harris, The European Social Charter (Charlottesville, University of Virginia Press, 1984) p. 268.

u/ Limburg Principles, 9 Human Rights Quarterly (1987), p. 122 at p. 131, paras. 70-73.

v/ Harris, op. cit.

w/ F. Jacobs, "The extension of the European Convention on Human Rights to include economic, social and cultural rights", 3 Human Rights Review (1978), p. 166 at pp. 177-78.

x/ H. Lauterpacht, International Law and Human Rights (London, Stevens, 1950), p. 286.